



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
FCP - 174767

PRELIMINARY RECITALS

Pursuant to a petition filed on June 3, 2016, under Wis. Admin. Code § DHS 10.55, to review a decision by the Care Wisconsin First, Inc. regarding a reduction in Family Care benefits. The hearing was held on July 21, 2016, by telephone, at Madison, Wisconsin.

The issue for determination is whether the Family Care Program has correctly reduced the petitioner's out-of-home overnight respite care from one night per week to one night per month due to agency policy.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Represented By:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [Redacted], Member Rights Specialist
Care Wisconsin First, Inc.
PO Box 14017
Madison, WI 53708-0017

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Dane County. He receives Family Care benefits from Care Wisconsin, Inc., the Department's designated Family Care provider in Dane County, and he has been enrolled in Family Care since at least November 1, 2014, when he began to reside with his adult legal guardian and sister, [Redacted], her husband, and their minor children. Prior to that date, he had been a resident of a facility known as [Redacted]

2. The petitioner is a 56 year-old single male. He is considered developmentally disabled under the so-called state definition, and physically disabled, both due to neurological impairments secondary to traumatic brain injury and subsequent stroke. These deficits inhibit his ability to participate in self-care independently, and to communicate effectively using receptive or expressive language. He requires constant supervision. He requires assistance with most activities of daily living (“ADLs”) and instrumental activities of daily living (“IADLs”). He also meets the Alzheimer’s disease or other irreversible dementia target group due to a diagnoses of dementia secondary to traumatic brain injury and vascular dementia. He has depression, asthma and functional incontinence, a history of myocardial infarction, congestive heart failure, hypertension, and hyperlipidemia. He wakes every night to go to the bathroom or smoke a cigarette. He exhibits impulsive behaviors, including wandering, inappropriate talking, invading others’ personal space, self-injurious behaviors including skin picking, and offensive/violent behaviors. He has memory deficits and a lack of safety awareness. He needs assistance with medication management, setup and administration. He inappropriately kisses children, raises his fist in anger, and does not maintain appropriate boundaries.
3. Since placement of the petitioner with [REDACTED] and her family in November, 2014, Family Care has provided one night of overnight respite care to the petitioner as part of his Family Care service plan.
4. On a date unknown in late April or early May, 2016, Care Wisconsin informed the petitioner that it would be reducing his services under the existing service plan, i.e., it would no longer pay for one overnight of respite care every week. Rather, this overnight respite care would only be provided once a month.
5. The petitioner and his guardian filed a grievance with Care Wisconsin and a grievance meeting was held on May 23, 2016. On that same date, Care Wisconsin issued a Notice to the petitioner and his guardian informing them that the resource allocation decision to reduce his overnight respite care from one night per week to one night per month had been; and that Care Wisconsin would offer to reimburse for supportive home care workers to come into the [REDACTED] residence on weekends to care for the petitioner so [REDACTED] could attend to other responsibilities out of the home for her family and children.
6. The petitioner filed an appeal with the Division of Hearings & Appeals on June 3, 2016, to contest the reduction of the frequency of his overnight respite care. He requested continued benefits and the benefits were ordered to continue pending the hearing.
7. The caregiver is at risk of burnout from the stress related to the provision of the extensive services required by the petitioner while living in her home on a full-time basis.
8. The agency has not cited to any statute, rule or contract provision with the Department of Health Services that bars respite care overnight on one night per week.
9. The agency has cited only to a written policy statement that bars more than 14 overnight respite care nights per calendar year that was not applied to or enforced against the petitioner’s service plan at any time between November 1, 2014, and May 23, 2016; and under which policy even the proffered reduction to one overnight respite care visit per month is also barred.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

An enrollee in the Family Care program has the right to “contest a decision, omission or action of a care management organization.” Wis. Stat. 46.287(b). If the matter is not resolved through contact with the CMO, the client is allowed to file a local grievance or request a departmental review. In this particular case, the unit is the Grievance Committee which reviews actions of the Community Care. The Grievance Committee did review and affirm the agency decision here to reduce respite care under the petitioner’s Care Plan. The petitioner still disagrees. Therefore, the petitioner sought a fair hearing from the Division of Hearings and Appeals for a de novo review of the program’s service reduction action pursuant to Wis. Stat. 227.44, Wis. Stat. 46.287(a), and Wis. Admin. Code §DHS 10.55(1).

The state code language on the scope of permissible services for the FC reads as follows:

DHS 10.41 Family care services. ...

(2) SERVICES. Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department’s contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n(c) and ss.46.275, 46.277 and 46.278, Stat., the long-term support services and support items under the state’s plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.

Note: The services that typically will be required to be available include adaptive aids; adult day care; assessment and case planning; case management; communication aids and interpreter services; counseling and therapeutic resources; daily living skills training; day services and treatment; home health services; home modification; home delivered and congregate meal services; nursing services; nursing home services, including care in an intermediate care facility for the mentally retarded or in an institution for mental diseases; personal care services; personal emergency response system services; prevocational services; protective payment and guardianship services; residential services in an RCAC, CBRF or AFH; respite care; durable medical equipment and specialized medical supplies; outpatient speech; physical and occupational therapy; supported employment; supportive home care; transportation services; mental health and alcohol or other drug abuse services; and community support program services.

Wis. Admin. Code §DHS 10.41(2).

Respite care (and supportive home care services) are included in the list of covered services in the statutory note above.

The legal guidance that pertains to determining the type and quantity of daily care services that must be placed in an individualized service plan (ISP) is as follows:

DHS 10.44 Standards for performance by CMOs.

...

(2) CASE MANAGEMENT STANDARDS. The CMO shall provide case management services that meet all of the following standards:

...

(f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. ... The service plan shall meet all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e)1.
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e)2 and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.

Wis. Admin. Code §DHS 10.44(2)(f).

In this case, the Family Care Program has been including one overnight respite care session per week for 19 months over three calendar years, to the petitioner and his caregiver relatives.

The agency representative, Ms. [REDACTED], testified that Care Wisconsin recently discovered that an agency policy described as a "SUPPLEMENTARY RAD GUIDELINE FOR FAMILY CARE AND PARTNERSHIP" (Eff. January 27, 2014) states that "*Respite care is the provision of short-term, temporary relief to caregivers.*" Further, the policy states that "Respite care is limited to no more than fourteen (14) days per calendar year. Respite is typically arranged in advance (1-2 weeks minimum), to allow time to secure staff or residential placement." See, Exhibit #4, at pp. 37-38.

Accordingly, Care Wisconsin representative [REDACTED] asserts, the Family Care Program was required by the policy to reduce the respite care being provided due to the 14 day per calendar year limit stated in Care Wisconsin's own written policy. The fact that the agency set up the regimen of respite care for nearly the preceding 19 months to provide respite care every week did not seem to matter to the agency in this analysis. Care Wisconsin did not cite to any administrative rule or DHS contract terms that required this "supplementary" RAD policy. Nor did it explain how the initial service plan was determined in November, 2014, that allowed the petitioner to have the respite care in the first place at the weekly frequency.

[REDACTED] further asserted that the policy states:

Respite Care

Introductory Philosophy: Respite care services are services provided to Care Wisconsin members on a short-term basis to relieve family caregivers from daily stress and care demands. Respite care can serve to prevent caregiver burn out and maintain quality relationships between the care recipient and the care provider.

See, Exhibit #4, at pp. 37-38.

██████ asserts that Ms. ██████ had indicated that the need for respite was so that she could attend to family activities like school activities and swim team competitions, and that the petitioner's behavioral problems and outbursts were not suited to attending such events with the family and many other families and children. Thus, she asserted that the respite was essentially being requested for caregiver convenience or convenience-like reasons, not patient centered reasons.

I note that the same policy statement goes on however, to state in parts relevant here:

Considerations for review:

Respite must be used to support family caregivers. Respite is not available for members residing in a CBRF, RCAC, or SNF. For owner-occupied Adult Family Homes, see the Care Wisconsin, Respite for owner-operated Adult Family Homes policy. Respite is short term and time limited. Services that occur daily, weekly, *or monthly* would not be considered respite, rather considered supportive home care, day services, etc....

Ibid. (Note: Italics added for emphasis.)

This latter quote highlights two important facts. Respite (care) is appropriately centered on giving respite to the *caregivers*. Secondly, even the proffered once a month overnight respite care *is not allowed* under this supplemental RAD policy statement.

The petitioner's guardian testified that during that time period, a respite care provider was being utilized that cost less than supportive home care services. However, that provider is no longer available and the new respite care provider is more expensive than before. She asserts that this is a factor in the agency's reduction of approved respite care. She further testified that she has family responsibilities, and requires some time on Saturday's to attend to the needs of her biological family for school and recreational activities focused on the development of her own children. She asserts that the petitioner has inappropriate behaviors that make it highly impractical to take him with the family to events with large numbers of other children and stimulation, like swim meets and school events.

To this, the agency offers on rebuttal that it offered a reasonable alternative to meet the petitioner's needs in conformance with the RAD policy statement when it offered the options of "supportive home care/self directed supports and one night of overnight respite per month to meet ██████ care and supervision needs, as well as your caregiver burnout prevention needs." See, Exhibit #2B.

Ms. ██████ replies that Mr. ██████ is a police officer in Madison, and he works a rotating 6 days on, 3 days off schedule and does not always have Saturdays off to care for ██████ while she takes the children to week-end activities. She also indicated that be given that fact, she does not want a new and strange provider coming into the home on weekends for supportive home care, and that ██████ looks forward to the overnight respite care with his providers in the past.

This is a close case. Were the situation a new Family Care recipient under a freshly minted FC service plan, I would have no great problem sustaining the agency generated internal policy on respite care. **But that is not the situation.** This caregiver chose to undertake a very strenuous regimen of care when her brother moved from an institutional setting to her family home. His cares and behaviors are lengthy. I am aware that she is compensated substantially for the services she renders. And I am aware that the agency has made a credible offer of some type of alternative regimen. But this agency has not demonstrated that Family Care statutes, rules, or contract demand this respite care limitation of frequency and duration. Rather, it has demonstrated that it discovered an internal policy that it intentionally or unintentionally

disregarded in framing the original service plan, and now the agency seeks to apply the policy at this late juncture. To do so would be to remove what appears to be a vital component of the plan that allows the caregiver to function as a family head and meet her individual family obligations as well as caregiver to the petitioner. The cares this patient requires are enormous, and undoubtedly stressful for the caregiver, spouse and family. The potential for caregiver burnout in short order seems particularly high to this observer. The petitioner's identified behavioral problems would stress the proverbial Job. The fact that the caregiver does not seem to stress the extent of the cares her brother requires does not blind me to the existence of the stress and the high risk for burnout. This is particularly true in a family setting where her spouse and family members also live with the petitioner. Both parties sold short the demands on the caregiver here to perform at a high level of supervision and attendance to needs, emotional, psychological and physical.

When reducing already existing benefits under public assistance programs, the burden of proof is on the agency to demonstrate by the preponderance of the evidence that the change is required by law, rule or in Family Care matters, by contract. No legal basis has been cited in these primary sources. Indeed, Family Care in general contemplates that respite care can be covered. Wis. Admin. Code §DHS 10.41(2). The sole source of written support is an agency internal policy that the agency ignored for 19 months prior, and the proffered alternative also does not conform to the policy in the mere component of offering monthly respite. Monthly respite is *also* barred by this policy.

The agency action cannot be sustained on this record. The mere internal policy only now invoked to discontinue a vital component of the petitioner's service plan since November, 2014, and offering a new regimen likewise violative of the same policy, does not meet the burden of proof to demonstrate the reduction is required by law. And in any event, I am satisfied that respite care is covered by Family Care and that this caregiver needs one overnight per week of respite care from the vast cares provided to the petitioner to avoid caregiver burnout. The reduction is reversed.

As a side-note to the petitioner and his representatives, this Decision does *not* mean that the service cannot be changed in the future. They would be well-served to work together with the agency to explore alternative care arrangements including some respite care and some supportive home care. This Decision only means that the service cannot be reduced under the current service plan in this review period under this agency decision of May 23, 2016. As the old aphorism states, "use time as a tool, and not as a couch". The recipient should engage in planning discussions with the agency for the future.

CONCLUSIONS OF LAW

That the Family Care Program, by Cares Wisconsin, has incorrectly reduced the petitioner's covered overnight respite care from one night per week to one night per month. The matter must be remanded for restoration of the prior weekly regimen of overnight respite in the current service plan.

THEREFORE, it is

ORDERED

That the matter is remanded to Care Wisconsin, Inc. with instructions to restore coverage by the petitioner's Family Care service plan for one overnight respite care per week for so long as the current service plan remains in force. These actions shall be completed within 10 days of the date of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Madison, Wisconsin, this 28th day of
July, 2016

\s _____

Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 28, 2016.

Care Wisconsin First, Inc
Office of Family Care Expansion
Health Care Access and Accountability